

COMPLAINT OF JUDICIAL MISCONDUCT

“We do not have Obama judges or Trump judges, Bush judges or Clinton judges What we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them. That independent judiciary is something we should all be thankful for.”

– United States Chief Justice John G. Roberts, Jr.¹

“Disagreeing with a court’s decision is everyone’s right, but when government officials question a court’s motives, mock its legitimacy or threaten retaliation due to an unfavorable ruling, they intend to erode the court’s standing and hinder the courts from performing their constitutional duties.”

– American Bar Association President Bob Carlson²

Introduction and Summary

Complainants file this Complaint under the Judicial Conduct and Disability Act³ against Senior Judge Edith Brown Clement of the Fifth Circuit Court of Appeals. Judge Clement committed misconduct by engaging in conduct that was prejudicial to the effective and expeditious administration of the business of the courts, undermined public confidence in the integrity and impartiality of the judiciary, and created a strong appearance of impropriety.

¹ See Debra Cassens Weiss, *Chief Justice Roberts Defends Judicial Independence After Trump’s ‘Obama Judge’ Criticism*, American Bar Association Journal (Nov. 21, 2018), available at: http://www.abajournal.com/news/article/chief_justice_roberts_criticizes_trumps_reference_to_obama_judge_in_asylum; Mark Sherman, *Roberts, Trump Spar In Extraordinary Scrap Over Judges*, Associated Press News (Nov. 21, 2018), available at: <https://www.apnews.com/c4b34f9639e141069c08cf1e3deb6b84>.

² Debra Cassens Weiss, *Chief Justice Roberts Defends Judicial Independence After Trump’s ‘Obama Judge’ Criticism*, American Bar Association Journal (Nov. 21, 2018), available at: http://www.abajournal.com/news/article/chief_justice_roberts_criticizes_trumps_reference_to_obama_judge_in_asylum.

³ 28 U.S.C. §§ 351–364.

In a recent dissenting opinion, Judge Clement made several shockingly derogatory and partisan-charged attacks against other members of the Fifth Circuit Court of Appeals and against the federal district judge who decided the underlying case, including:

- “I am afraid defendants have simply had the poor luck of drawing a *majority-minority* panel.”
- “The fact remains that [U.S. District Court Judge Carlton W. Reeves]’s order—perhaps, inadvertently—eliminated meaningful competition for Thomas in the upcoming election. The majority says that Judge Reeves’s plan is ‘narrowly tailored.’ Agreed—it is ‘*narrowly tailored*’ to win Thomas the election.”
- “Unless we act now, the November election in Senate District 22 is all but decided. True, predictable election results are not uncommon. What is uncommon, however, is for a federal district judge to be the one to decide them.”

(Emphasis added.)

These inappropriate comments are exactly the type of conduct that United States Supreme Court Chief Justice John G. Roberts, Jr. warned against in his public statement, quoted above.⁴ Judge Clement’s statements demonstrated a lack of respect for her fellow federal judges, a lack of judicial temperament, and a failure to maintain and observe the high standards of conduct required of federal judges.

⁴ Cf. Ruth Bader Ginsburg, *Judicial Independence: The Situation of the U.S. Federal Judiciary*, 85 Neb. L. Rev. 1, 7 (2006) (“Federal judges, whether appointed by Republican or Democratic Presidents, generally endeavor to administer justice impartially and to interpret laws reasonably and sensibly, with due respect restraint and fidelity to precedent.”).

We submit that Judge Clement’s conduct in making these public statements about her federal judicial colleagues violated 28. U.S.C. § 351 and the Code of Conduct for United States Judges.⁵

The Underlying Case

The underlying case⁶ involved in this Complaint was a 2018 Voting Rights Act challenge to the boundaries of Mississippi State Senate District 22. The three plaintiffs alleged that the State of Mississippi had illegally gerrymandered the district “by diluting the voting strength of African-Americans that [Mississippi] Delta demographics and geography should otherwise support.”⁷

U.S. District Court Judge Carlton S. Reeve conducted a bench trial in February 2018, and concluded that the plaintiffs had established the existence of vote dilution in

⁵ The Judicial Conference’s Commentary on Rule 4 states that the Code of Conduct for United States Judges may be “instructive” in determining whether a judge has engaged in misconduct. Federal judicial discipline decisions have cited and relied on the Canons. *See, e.g., In re Complaint of Judicial Misconduct (Paine)*, 664 F.3d 332, 335 (U.S. Judicial Conference 2011) (stating that the Judicial Conference adopted the Code to “provide standards of conduct for application in judicial-conduct and judicial-disciplinary proceedings brought pursuant to the Act. Commentary to Canon 1. The Canons of the Code of Conduct offer general guidance.”; concluding that Judge George Paine, II violated Canons 2A and 2C of the Code of Conduct for United States Judges by belonging to a country club that discriminated against African Americans and women; and overturning the Sixth Circuit’s Judicial Council’s finding that Judge Paine had not engaged in misconduct); *In re Porteous*, Order and Public Reprimand (Judicial Council 5th Cir. Sep. 10, 2008) (Jones, C.J.) (concluding that Judge Porteous violated Canons 1, 2A, 3C(1), 3D, 5C(1), 5(1), (4), and (6) of the Code of Conduct for United States Judges); *In re Complaint of Judicial Misconduct (Kozinski)*, 575 F.3d 279 (Judicial Council 3d. Cir. 2009) (admonishing Chief Judge Kozinski (of the Ninth Circuit), concerning an incident arising from the judge’s retention of email containing sexually explicit material in a subdirectory of his personal computer that was publicly accessible; and citing and quoting from Canon 2A and the Commentary to that Canon).

⁶ *Thomas v. Bryant*, 2019 WL 1306304 (5th Cir. 2019).

⁷ *Id.* at *1.

violation of Section 2 of the federal Voting Rights Act.⁸ The district court initially declined to order a remedy in order to allow the Mississippi Legislature time to consider redrawing the district lines.⁹ But after the Legislature indicated that it would not act in time for the upcoming deadline for candidate filing, Judge Reeves ordered the adoption of one of the maps drawn by the Plaintiff's experts as the new boundaries of District 22. Judge Reeves declined to enter a stay and issued final judgment. The defendants immediately appealed, seeking a stay of the district court's final judgment.¹⁰

On appeal, a majority of the three-judge Fifth Circuit panel held that the defendants had failed to show a high likelihood of overturning the district court's finding of a Section 2 violation. However, in an opinion authored by Judge Costa and joined by Judge James L. Dennis, the Fifth Circuit concluded that the defendants had satisfied the factors for issuance of a stay to allow the Mississippi Legislature an opportunity to redraw the District 22 boundaries to remedy the Section 2 violation. Therefore, the Fifth Circuit issued a stay until April 3, 2019 to permit the Mississippi Legislature time to redraw the maps, and also extended the candidate filing deadline for District 22 until April 12, 2019.¹¹

Judge Clement's Dissent

Judge Clement disagreed with the majority's decision. In a vitriolic dissent, she criticized the majority's decision not to grant a complete stay to prevent the adoption of the new district boundaries before the upcoming election. She also highly disapproved of

⁸ *Id.* at *2.

⁹ *Id.* at *2-3.

¹⁰ *Id.* at *3.

¹¹ *Id.* at *11.

the district court's adopted redrawn district boundaries, because those new boundaries resulted in the re-districting of two Republican candidates for the District 22 congressional seat, leaving only one of the named plaintiffs (Thomas) as a current candidate for that seat.

But this Complaint does not concern the merits of Judge Clement's dissent.¹² Rather, this Complaint takes issue with the highly partisan and insulting personal comments about her federal judicial colleagues. Those statements were both egregiously inappropriate and completely unnecessary for Judge Clement to include in her dissent. The comments included:

- "I am afraid defendants have simply had the *poor luck* of drawing a *majority-minority* panel."¹³
- "The fact remains that [U.S. District Court Judge Carlton W. Reeves]'s order—perhaps, inadvertently—eliminated meaningful competition for Thomas in the upcoming election. The majority says that Judge Reeves's plan is 'narrowly tailored.' *Agreed—it is 'narrowly tailored' to win Thomas the election.*"¹⁴
- "Unless we act now, the November election in Senate District 22 is all but decided. True, predictable election results are not uncommon. *What is uncommon, however, is for a federal district judge to be the one to decide them.*"¹⁵

¹² Indeed, Complainants recognize that such allegations would not be proper grounds for a complaint. *See* Rules for Judicial-Conduct and Judicial-Disability Proceedings, Article II(4)(b)(1) (stating that "cognizable misconduct does not include an allegation that calls into question the correctness of a judge's ruling. . . . If the decision or ruling is alleged to be the result of an improper motive, *e.g.* a bribe, ex parte contact, racial or ethnic bias, or improper conduct in rendering a decision or ruling, such as personally derogatory remarks irrelevant to the issues, the complaint is not cognizable to the extent it attacks the merits of the decision.").

¹³ *Thomas*, 2019 WL 1306304 at *19 (emphasis added).

¹⁴ *Id.* at *13 (emphasis added).

¹⁵ *Id.* at *12 (emphasis added).

The comments offered no substantive legal analysis. Instead, they served only to malign Judge Clement's fellow judges and directly question the "integrity and impartiality of the judiciary," which the Code of Conduct prohibits.¹⁶

Judge Clement's statement that the defendants had "poor luck" in "drawing a majority-minority panel" plainly referred to the fact that Judges Costa and Dennis were appointed by Democratic presidents when the overwhelming majority of the sitting Fifth Circuit judges were appointed by Republican presidents.¹⁷ The statements falsely, harshly, and disrespectfully assumed that Judges Costa and Dennis decided the case not on the merits, but on partisan considerations, simply because they were appointed by Democratic Presidents.

That is exactly the type of conduct that Chief Justice Roberts so strongly (and soundly) disapproved of in his recent public statement: "We do not have Obama judges or Trump judges, Bush judges or Clinton judges. What we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them."

Reasonable judges often disagree with one another, sometimes strongly. What judges must not do is violate the Code of Judicial Conduct of United States Judges by undermining "the integrity and independence of the judiciary" (Canon 1), or failing "to act at all times in a manner that promotes public confidence in the integrity and impartiality of

¹⁶ Canon 2A, Code of Conduct of United States Judges.

¹⁷ See <http://www.ca5.uscourts.gov/about-the-court/fifth-circuit-judges>. Like many of her Fifth Circuit colleagues, Judge Clement was also nominated by a Republican president, specifically George H.W. Bush.

the judiciary” (Canon 2), or failing to “perform [judicial] duties with respect for others” (Canon 3), or failing to be “patient, dignified, respectful, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity” (Canon 3A(3)). Judge Clement violated all of those standards.

Indeed, the majority opinion recognized the highly inappropriate nature of Judge Clement’s statements, calling them “irresponsibl[e]” and disputing Judge Clement’s insinuation that the district court had been trying to eliminate partisan opposition for Plaintiff Thomas.¹⁸ In response, Judge Clement doubled-down on her criticism of the majority and the district court, stating:

[E]ven though the slate of candidates had not and could not have been finalized at the time of the district court’s order, it does not require a crystal ball to foresee the result of Judge Reeves’s remedy. He eliminated the Republican base in District 22, essentially making the primary election dispositive. As far as we know, Thomas is the only previously-elected State Senator running in that primary and as far as we know, his only two Republican challengers are now in another district.¹⁹

These statements demonstrated again that Judge Clement lacks judicial restraint when it comes to critiquing her fellow judges.

¹⁸ *Id.* at *11 (“One final comment is necessary to set the record straight in response to the dissent’s attack on the remedy. It irresponsibly insinuates that the district judge—whom it takes the unusual step of repeatedly naming—drew new lines with the aim of eliminating partisan opposition to Plaintiff Thomas. That is not true. Importantly, the incumbent state senator in District 22 had decided not to run for reelection before the district court ruled in this case. The dissent’s conjecture also ignores that primary candidates file with the political party (not the state), with the parties notifying state officials of the candidates only after the filing deadline. That had not yet occurred when the court issued final judgment.”).

¹⁹ *Id.* at *11, n. 1.

Judge Clement also displayed a lack of respect for U.S. District Court Judge Reeves by referring to him by name throughout her dissent opinion, rather than taking the traditional approach of referring to only the “district court.”²⁰

Complainants respectfully submit that Judge Clement’s wholly inappropriate, unnecessary, disrespectful, and disparaging statements violated the following Canons of the Code of Conduct of United States Judges:

- **Canon 1** – requiring judges to “maintain and enforce high standards of conduct, and . . . personally observe those standards, so that the integrity and independence of the judiciary is preserved.”
- **Canon 2A** – requiring that “[a] judge . . . should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.”
- **Canon 2B** – requiring that “[a] judge should not allow . . . political . . . relationships to influence judicial conduct or judgment.”
- **Canon 3** – requiring that “[a] judge should perform [judicial] duties with respect for others, and should not engage in behavior that is harassing, abusive, prejudiced, or biased.”
- **Canon 3A(1)** – requiring that “[a] judge . . . should not be swayed by partisan interests”
- **Canon 3A(3)** – requiring that “[a] judge should be patient, dignified, respectful, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity.”
- **Canon 5C** – requiring that “[a] judge should not engage in any other political activity.”

²⁰ See footnote 18, above.

We submit that Judge Clement’s misconduct is serious. It serves to undermine the public respect for the federal judiciary that is critically important for the continued success of our judicial system. Judges’ “actions *must foster respect* for their decisions as well as for *the judiciary as a whole*.”²¹

Request for Transfer

Complainants respectfully request that under Rule 26 of the Rules for Judicial-Conduct and Judicial-Disability Proceedings, the Judicial Council for the Fifth Circuit ask the Chief Justice of the United States to transfer this proceeding to the judicial council of another circuit. Rule 26 expressly authorizes this transfer. The Commentary to Rule 26 states that “[s]uch transfers may be appropriate . . . where the issues are highly visible and a local disposition may weaken public confidence” The nature of the allegations in this Complaint both are highly visible and involve Judge Clement’s treatment of and conduct toward other members of the Fifth Circuit. Therefore, transfer is appropriate.²²

²¹ Jeffrey M. Shaman, Steven Lubet & James J. Alfini, *Judicial Conduct and Ethics* § 1.01, 1 (1995).

²² The Fifth Circuit previously followed this transfer procedure in connection with a complaint filed against Judge Edith Jones, and the Chief Justice granted the transfer request. *See In re Charges of Jud. Misconduct (Jones)*, 769 F.3d 762, 763 (D.C. Cir. 2014) (“The complainants asked the Judicial Council of the Fifth Circuit to request that the Chief Justice of the United States transfer the proceeding to the judicial council of another circuit, pursuant to Rule 26 of the Rules for Judicial–Conduct and Judicial–Disability Proceedings of the Judicial Conference of the United States (Judicial–Conduct Rules). On June 7, 2013, Chief Judge Stewart of the Fifth Circuit wrote to Chief Justice Roberts, requesting that he transfer the Complaint. Chief Judge Stewart stated that a transfer was warranted given the “highly visible” nature of the allegations, the fact that the subject of the Complaint was “the immediate past chief judge” of the circuit, and the fact that the Complaint included allegations regarding Judge Jones’ conduct toward a fellow circuit judge who was a member of the Fifth Circuit’s Judicial Council. See Letter from Chief Judge Stewart to Chief Justice Roberts (June 7, 2013). On June 12, Chief Justice Roberts transferred the Complaint to the Judicial Council of the District of Columbia Circuit.”); *see also In re Complaint of Judicial Misconduct (Kozinski)*, 575 F.3d 279, 280 (Judicial Council 3d. Cir.

Rule 6(d) Certification

In accordance with Rule 6(d) of the Rules for Judicial-Conduct and Judicial-Disability Proceedings, the factual statements in the Complaint are true and correct, as verified in the attached Complaint Form, made under penalty of perjury.

Respectfully Submitted,

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2009) (“The Judicial Council of the Ninth Circuit asked the Chief Justice of the United States to transfer the identified Complaint to the judicial council of another circuit pursuant to Rule 26. On June 16, 2008, the Chief Justice granted the request and selected the Judicial Council of the Third Circuit to exercise jurisdiction over the Complaint. See Rule 26.”).